

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 12, 2009 Session

DONALD OWEN DISHMAN v. CHERYL ELAINE DISHMAN

Appeal from the Chancery Court for Rutherford County
No. 05-1669DR Robert E. Corlew, III, Chancellor

No. M2008-01194-COA-R3-CV - Filed May 1, 2009

This appeal arises from the modification of a parenting plan in a post-divorce action. Mother had been designated the primary residential parent in the Permanent Parenting Plan adopted by the parties. Soon after the divorce, Father filed a Petition to Amend the Parenting Plan alleging that a material change in circumstances existed and that it was in the children's best interests for him to be designated as the primary residential parent. The trial court found that Mother's problems with alcohol, issues concerning her boyfriend (now husband), and several other factors demonstrated that a material change in circumstances had occurred and that it was in the best interests of the children for Father to be designated the primary residential parent. Mother appeals claiming that the trial court erred in its determination that a material change in circumstances existed and that a modification was in the children's best interests. We affirm the trial court's decision in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Kirk D. Catron, Murfreesboro, Tennessee, for the appellant, Cheryl E. Dishman (now Hunt).

Kimpi K. Kendrick, Murfreesboro, Tennessee, for the appellee, Donald Owen Dishman.

OPINION

The parties in this action divorced on April 21, 2006 on the ground of irreconcilable differences. In the final divorce decree, which adopted the Marital Dissolution Agreement and the Permanent Parenting Plan, Cheryl Elaine Dishman (Mother) was named the primary residential parent of the parties' three minor children, and Donald Dishman (Father) was ordered to pay child support of \$1,253.00 per month.

On June 16, 2006, Father filed a Petition to Modify the Parenting Plan based upon allegations that Mother had removed the three minor children from daycare and placed them in the care of her

new boyfriend, who had moved into Mother's home the day the divorce was final,¹ and that Mother refused to provide Father with information regarding the man. Father filed an Amended Petition on February 5, 2007, to include additional allegations that Mother had lost her job due to alcohol abuse, that Father had smelled alcohol on Mother's person when she had driven the children, and that Mother had been arrested for Driving Under the Influence. Father also alleged that Mother's boyfriend had engaged in inappropriate behavior with the parties' two minor daughters. In addition to seeking a modification of the parenting plan, Father sought a modification of his child support obligation based on the children being removed from daycare, which was an expense incorporated into his child support obligation. Mother filed an Answer and Counter-Complaint denying the allegations and alleging that Father had paid less than his required amount of child support.

A hearing on this matter was held on March 31, 2008, with the trial court issuing a Memorandum Opinion on April 7, 2008, which was incorporated into an order entered April 28, 2008. The trial court found that a substantial change of circumstances had occurred in that the parties had remarried, Mother had lost "good and substantial employment" due to alcohol problems, Mother had pled guilty to the lesser charge of reckless endangerment following her arrest for driving under the influence, and concerns existed regarding Mother's new husband, who had been unemployed since their marriage and engaged in inappropriate behavior with the parties' two minor daughters. The trial court found that these facts established a substantial change of circumstances. The court then evaluated the best interests of the children. The trial court expressed serious concerns regarding the credibility of Mother and her new spouse based on its finding that they had provided prior testimony, which the court found to be "misleading, if not absolutely false," and their failure to acknowledge the "misleading nature" of their former testimony.² The court also found that the instability of the environment provided by Mother, Father's ability to provide a stable family unit, the character of Mother's current spouse, and the apparent abilities of the parties to provide parenting responsibilities favored Father, while a few factors weighed in favor of Mother, or favored both parties equally. Based on its evaluation, the court named Father as the primary residential parent subject to Mother's "liberal visitation," and required Mother to pay Father child support in the amount of \$374.00 per month. The court also awarded Father \$2,826 in child support overpayments based upon the children's removal from daycare.³ Mother appeals the trial court's decision to name Father as the primary residential parent.

ANALYSIS

¹Mother had denied the existence of an "internet boyfriend" during the pendency of the divorce.

² The court elaborated on its reasons for finding that Mother and her husband lacked credibility by citing her "discussion of the reasons for her termination from her former employer." In a job application, Mother had indicated she had left her previous job due to a "slow season" and that she had never been discharged from employment, while the actual reason for her discharge was her possession of alcohol at work. While Mother had pled guilty to reckless driving after being charged with driving under the influence, under oath, she stated that she felt her conviction for reckless endangerment was only a "minor traffic violation."

³On appeal, Mother does not contest the judgment for Father on the child support award, and therefore, we will not address this.

The law is well established that when a decree establishing a parenting plan has been entered and becomes final, the parenting plan is res judicata and is conclusive in a subsequent application for modification unless a new fact has occurred which has altered the circumstances in a material way so that the best interests of the child requires a modification of the parenting plan. *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999) (citing *Long v. Long*, 488 S.W.2d 729 (Tenn. Ct. App.1972)). Accordingly, the trial court cannot modify a permanent parenting plan absent proof of a material change in circumstances affecting the child’s best interest and proof that a modification of the plan is in the child’s best interests. *Id.* (citing *Massengale v. Massengale*, 915 S.W.2d 818, 819 (Tenn. Ct. App.1995)).

SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES

The threshold issue in modification proceedings is whether a material change in circumstances affecting the child’s best interest has occurred since the adoption of the existing parenting plan. Tenn. Code Ann. § 36-6-101(a)(2); *see Kendrick*, 90 S.W.3d at 570.

For purposes of modification of the designation of the primary residential parent (formerly “custodian”) the petitioner must prove by a preponderance of the evidence “a material change in circumstance.” Tenn. Code Ann. § 36-6-101(a)(2)(B). “A material change of circumstance does not require a showing of a substantial risk of harm to the child.”⁴ *Id.* For purposes of this section, “A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.” *Id.*

The following factors are considered an appropriate basis for holding that a material change in circumstances has occurred: (1) the change occurred “after the entry of the order sought to be modified,” (2) the change was “not known or reasonably anticipated when the order was entered,” and (3) the change “affects the child’s well-being in a meaningful way.” *Kendrick*, 90 S.W.3d at 570 (quoting *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)); *see also Dalton v. Dalton*, 858 S.W.2d 324, 326 (Tenn. Ct. App. 1993) (holding a change of circumstances affecting the welfare of the child may include any “new facts or changed conditions that could not be anticipated by the former decree”). The petitioner bears the burden of proof. Tenn. Code Ann. § 36-6-101(a)(2).

Father presented evidence that Mother’s boyfriend moved into Mother’s residence and soon thereafter became the primary care-taker of the parties’ three minor children, and that her new husband had engaged in inappropriate conduct with the two minor daughters which, he contended, warranted modification to the parenting plan.

⁴On appeal, Mother places significant reliance on the fact that the order modifying the parenting schedule was not to take effect until 45 days later, and, therefore argues that there was no change significant enough to warrant a modification. However, “a material change of circumstances does not require a showing of substantial risk of harm to the child,” and therefore we find her argument has little merit. *See* Tenn. Code Ann. § 36-6-101(a)(2)(B).

In spite of the fact that Mother consistently stated she was not involved in a relationship with another man while the parties were getting divorced, the day the divorce decree became final, Mother's future husband moved into her residence.⁵ If it is to be believed that Mother did not have a lover before the divorce, then she allowed a stranger to move in and reside with the children. More troubling is the fact she allowed this stranger to become the primary care-giver of the children. If, however, she knew the man well enough to allow him to move in her home the day after the divorce, then she was dishonest with Father and the trial court at the time the initial parenting plan was entered into. The trial court found Mother lacked credibility.

Father also presented evidence to establish that Mother had a severe alcohol abuse problem. The foregoing notwithstanding, there is compelling evidence that Mother has developed a serious alcohol problem that adversely affects the best interests of the children; a problem so severe that it cost her the job she had at the time of the divorce and she was arrested for driving under the influence. Also troubling is the fact that she had alcohol on her breath after driving the children to meet Father as they exchanged parenting time.

We affirm the trial court's findings that the foregoing circumstances constitute substantial and material changes that affected the children's best interest.

BEST INTERESTS OF THE CHILDREN

If the court determines that substantial and material changes in circumstances have occurred that affect the children's best interests, the court must then determine whether modification of the parenting plan is in the children's best interests and, if so, to fashion a plan that is in the children's best interests. *Kendrick*, 90 S.W.3d at 570.

Whether modification of an existing parenting plan is in the children's best interests should be determined based on the factors set forth in Tennessee Code Annotated § 36-6-106:

- (1) The love, affection and emotional ties existing between the parents or caregivers and the child;
- (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that, where there is a finding, under subdivision (a)(8), of child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and

⁵By the time this petition came on for hearing, she had married her non-existent lover.

that a nonperpetrating parent or caregiver has relocated in order to flee the perpetrating parent, that the relocation shall not weigh against an award of custody;

(4) The stability of the family unit of the parents or caregivers;

(5) The mental and physical health of the parents or caregivers;

....

(9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child; and

(10) Each parent or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child.

Tenn. Code Ann. § 36-6-106(a)(1)-(5), (9)-(10) (2008).

Mother argues on appeal that the trial court failed to articulate its findings that the best interests of the minor children had been impacted under her supervision.⁶ While it is advisable that the trial court provide details when identifying the factors it considers, the statute only requires the trial court to discuss the factors the court considers relevant. *See Morman v. Morman*, No. M2005-00931-COA-R3-CV, 2006 WL 2068757, at *2 (Tenn. Ct. App. July 25, 2006). The trial court is to identify the applicable factors and state its conclusion as to how each applicable factor impacts its best interest determination. *Id.* (citing *Burnett v. Burnett*, E2002-01614-COA-R3-CV, 2003 WL 21782290, at *6 (Tenn. Ct. App. July 23, 2003)).

In making its determination in this case, the trial court identified in its Memorandum Opinion, and the order which followed, the factors it considered relevant, and in whose favor those factors weighed.⁷ As the trial court determined, the first factor enumerated under the statute, which addresses the love, affection, and emotional ties existing between the parent and the children, weighs in favor of Mother, as she had been the primary residential parent; however, most of the remaining relevant factors favor Father.

⁶Mother contends the trial court “failed to articulate any findings that the best interests of the minor children had been impacted under the [Mother’s] supervision, or that a substantial and/or material change of circumstances had occurred.” We find no basis in fact to support this argument. The trial court clearly articulated in its Memorandum Opinion and the order its reasons for finding a substantial material change in circumstances and that the modification was in the best interests of the children.

⁷The trial court found that five of the factors favored the Father, one factor favored the Mother, two factors favored the parties equally, and that two factors were inapplicable.

Father and his wife maintained a stable home environment for the children and stable employment. *See* Tenn. Code Ann. § 36-6-106(a)(3), (4). Mother, on the other hand, lost her job due to her abuse of alcohol, she remained unemployed for months thereafter, and the court found that she and her new husband were not credible. Therefore, factors (3) and (4), regarding the stability of the family unit and the environment the children lived in, weigh in favor of Father.

While no issues were raised regarding Father's wife, concerns were raised regarding Mother's husband. Since moving into Mother's residence, her husband has failed to seek or obtain employment. More importantly, the trial court expressed concern regarding his credibility and truthfulness. Concerns were also raised regarding his inappropriate behavior toward the parties' minor daughters. The character and behavior of a person who resides in the home with the parent and their interactions with the children can be an important factor if relevant. Tenn. Code Ann. § 36-6-106(a)(9). It is relevant here, and the factor weighs heavily in favor of Father.

Especially relevant to the issue at hand is each parent's past and potential for performance of parenting responsibilities. Tenn. Code Ann. § 36-6-106(10). The evidence clearly demonstrates that Mother made serious errors in judgment that adversely affected the interests of her children. Mother lost her job by consuming alcohol during work hours or on work premises. She was also arrested for driving under the influence, and pled to the lesser charge of reckless driving. More importantly, as Father testified, Mother had the smell of alcohol about her person when she drove the car to exchange the children. This factor also weighs heavily in favor of Father.

Based on our examination of the statutory factors set forth under Tenn. Code Ann. § 36-6-106, we find that the modification of the parenting plan to name Father as the primary residential parent was in the best interests of the children. We, therefore, affirm the trial court's modification of the custody arrangement in all respects.

FRIVOLOUS APPEAL

Father has asked this court to declare Mother's appeal frivolous and award him damages in the form of attorneys' fees. While we are ruling adversely to Mother, in order to find an appeal frivolous, it must be wholly without merit and lacking in justiciable issues. *See Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn.1977). We do not find Mother's appeal wholly without merit and, therefore, deny Father's request.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Appellant, Cheryl E. Hunt.

FRANK G. CLEMENT, JR., JUDGE